

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JENNIFER AUGUST, : C.A. No. SS06J-09-168

Plaintiff, :

v. :

DAVID AUGUST, :

Defendant. :

JENNIFER AUGUST, : C.A. No. SS07J-09-096

Plaintiff, :

v. :

DAVID AUGUST, :

Defendant. :

COMMISSIONER’S FINDINGS OF FACT AND RECOMMENDATIONS

UPON DEFENDANT’S MOTION TO STAY EXECUTION

DATE SUBMITTED: October 17, 2011

DATE DECIDED: November 16, 2011

Jennifer August, *pro se*, 2 Black Duck Reach, Rehoboth Beach, DE 19971

David August, *pro se*, 303 B St. James Place, Mansfield, PA 16933

These actions are judgment liens which Jennifer August (“Creditor”) entered against David August (“Debtor”) to secure the payment of Family Court judgments. Within the past year, Creditor sought to execute on one of the judgments and Debtor sought to stay the execution. The matter was referred to the Commissioner pursuant to 10 *Del. C.* § 512, Superior Court Civil Rule 132, and Administrative Directive 2007-5.

On October 17, 2011, a hearing was held in the matter. Set forth below are the procedural posture of these cases, findings of fact, and recommendations regarding the resolution of the pending matters.

PROCEDURAL POSTURE

Two judgment liens exist in Superior Court involving these parties. The judgment lien upon which Creditor has executed is the later judgment. Both judgment liens arise from Family Court proceedings involving these parties. Because monies have been paid to Family Court and to Creditor towards the underlying debts secured by the judgment liens and because payments are to be applied to the first filed judgment, it is necessary to consider both judgments in this matter. Consequently, the Court *sua sponte* joined the first judgment action with the second in order to render an accurate and complete accounting in the matters.

The first judgment action is *August v. August*, C.A. No. SS06J-09-168. (“Judgment 1”).¹ Judgment 1 is based upon a September 14, 2006 Family Court Order (“9/14/06 Family Court Order”) wherein that court held Debtor in contempt for failure to pay child support and spousal

¹Plaintiff’s Exhibit #2.

support.² The 9/14/06 Family Court Order states:

Obligor owes arrears/retroactive support of \$14679.52 as of 09/01/2006, as established by this order, calculated as follows: 5 MONTHS @ \$950.00 PLUS 7 MONTHS @ \$2351.00 MINUS \$6248.24 PAID THRU DCSE³ AND \$279.24 DIRECT PLUS 7 MONTHS OF ALIMONY (\$2282.11).

The \$14,679.52 figure which the Family Court listed is not the **total** amount of arrears owed. Instead, that figure represents only the child support arrears. The correct calculation shows **total child support arrears** were **\$14,679.52⁴** and **total alimony arrears** were **\$15,974.77.⁵** The alimony arrears sum added to the child support arrears sum totals **\$30,654.29**. Unfortunately, the sentence "Obligor owes arrears/retroactive support of \$14679.52 as of 09/01/2006" was a misstatement.⁶ However, the misstatement is fortuitous because the \$15,974.77 in spousal arrears are made a part of the second judgment involved in this case. To have had two judgments awarding duplicate spousal arrears would have been illegal. Since Judgment 1 deals with child support arrears and the second judgment deals with spousal support arrears, no duplication of

²"Spousal support" is another term for "alimony", whether interim or permanent. The Family Court uses those terms interchangeably as does this court.

³"DCSE" is the abbreviation for Delaware's Division of Child Support Enforcement.

⁴Child support arrears as of 9/1/06 are calculated as follows:

$\$950.00 \times 5 = \$4,750.00$
 $\$2,351.00 \times 7 = \$16,457.00$
Subtotal: \$21,207.00
Minus Payments: \$6,527.48 (\$6,248.24 + \$279.24)
Total **Child Support** Owed: **\$14,679.52**

⁵ $\$2,282.11 \times 7 = \$15,974.77$.

⁶I overlooked that misstatement during earlier proceedings in this case.

awards exists. Judgment 1 is for **\$14,679.52.**⁷ No interest was awarded.

The second judgment ("Judgment 2") stems from an August 13, 2007 Order of the Family Court regarding Creditor's Petition for Rule to Show Cause ("RTSC"), Petition to Modify Custody and Visitation, and a Request for Review of Commissioner's Order ("8/13/07 Family Court Order").⁸ The 8/13/07 Family Court Order provides for Creditor to recover **\$78,921.09**, which is made up of **\$30,000.00 in interim alimony** Debtor failed to pay pursuant to an August 2004 interim order; **\$34,152.41 in permanent alimony**;⁹ a **\$4,768.68** payment on Creditor's **equitable share** of the marital estate; and **\$10,000.00 in attorney's fees** owed to Creditor as of the date of the RTSC hearing.¹⁰ The 8/13/07 Family Court Order specifically provides as follows at 8:

Therefore, judgment is hereby entered in favor of Wife against Husband in the **principal sum** of \$78,921.09, together with **post-judgment interest at the legal rate** commencing from May 16, 2007, together with **costs incurred in perfecting this judgment and levying on the same**. Wife is hereby authorized to enter this judgment on the Superior Court records of the State of Delaware. [Emphasis added.]

⁷The 9/14/06 Family Court Order (Plaintiff's Exhibit #2) provided at ¶6: "Arrears are reduced to a judgement which may be filed with the Prothonotary and entered in the Judgement Docket of the Superior Court, thus operating as a lien...."

⁸*August v. August*, C.A. No. SS07J-09-096, which is Plaintiff's Exhibit #3.

⁹This figure was calculated from February 2006 to May 2007, and consequently includes the **\$15,974.77** which was ordered in the 9/14/06 Family Court Order.

¹⁰The interim child support award in the amount of \$8,288.00 was not included in this judgment because "the Court's child support arrears/contempt order dated September 14, 2006, addressed this issue and applied the back support to Husband's DCSE balance." 8/13/07 Family Court Order at 8.

The post-judgment interest rate is calculated pursuant to 6 *Del. C.* § 2301(a).¹¹ The Court takes judicial notice of the fact that the Federal Reserve discount rate at that time was 6.25%. Consequently, the interest rate is 11.25% per annum, which breaks down to .938% per month or .0308 % per day.¹²

In the past, Creditor has executed on Judgment 2. Within the past year, she commenced new execution proceedings. In response thereto, Debtor filed his motion to stay. He advanced numerous contentions in support of this motion: he was in full compliance with the Family Court payments to Creditor; this debt was disputed in Chancery Court; the amount Creditor claimed to be owed is not accurate; there is a pending Family Court petition in the matter; past efforts to levy have failed to produce money because the house is heavily mortgaged; he does not own a boat upon which she seeks to levy; a levy on the Chevrolet will generate poor returns; and he will have greater cash flow to pay Creditor once alimony requirements end in August, 2011.¹³

The only valid ground for stopping the execution on the levy is that Debtor does not owe Creditor anything on the judgments. The legally correct proceeding to have pursued would have been one seeking relief pursuant to 10 *Del. C.* § 4751, *et seq.*¹⁴ However, because the parties are *pro se* and because the practical effect is the same as it would have been had Debtor filed such a petition, this Court hereby addresses, within the context of the execution proceedings, the issue

¹¹*M&G Polymers USA, LLC v. Carestream Health, Inc.*, 2010 WL 2125463, * 3 (Del. Super. May 21, 2010).

¹²*Id.*

¹³Debtor's Motion to Stay Levy filed 9/29/11 in *August v. August*, C.A. No. SS07J-09-096.

¹⁴*See Beijger v. Shreeve*, 1997 WL 524060 (Del. Super. June 26, 1997).

of whether Debtor's debts to Creditor have been satisfied.¹⁵

FINDINGS OF FACT AND RECOMMENDED CONCLUSIONS OF LAW¹⁶

The parties, who have three daughters together, divorced in 2003, and in the early 2000's, the Family Court began issuing orders on ancillary matters. By order dated August 26, 2004 ("8/26/04 Family Court Order"), the Family Court ordered Debtor to provide Creditor with some funds, specifically, \$30,000.00 in cash which should have been transferred as follows: \$10,000.00 no later than September 10, 2004; \$10,000 no later than October 10, 2004; and \$10,000.00 no later than November 10, 2004.¹⁷ The Family Court further directed that Creditor was responsible for paying monthly mortgage payments of approximately \$2,500.00 on the marital home and to continue paying child support.

Debtor filed for bankruptcy in September, 2004. In January, 2005, the Bankruptcy Court granted relief from the stay to allow the ancillary Family Court proceedings to continue.¹⁸

In its order dated January 30, 2006, the Family Court resolved all of the parties' ancillary issues. This order, which is Plaintiff's Exhibit #1, is referenced as "1/30/06 Family Court Order".

¹⁵The Family Court, of course, has jurisdiction over the debt issues since the judgment liens here are based upon Family Court's judgments. However, this Court also has jurisdiction, based on 10 *Del. C.* § 4751, *et seq.*, to determine whether monies remain owing on the judgments.

¹⁶The findings of facts are based upon testimony given and exhibits entered at the October 17, 2011 hearing. These facts are clear and undisputed. The conclusions of law which I recommend the Superior Court adopt are italicized for ease of reference.

¹⁷Plaintiff's Exhibit #7.

¹⁸Plaintiff's Exhibit #1 at 2, which is a Family Court Order issued on January 30, 2006. Although the order is dated January 30, 2005, the parties agree that the year is incorrect; the order actually was entered on January 30, 2006.

In resolving the marital assets aspect of this case, Family Court ordered Debtor to pay Creditor \$4,761.68 per year for five years, payable annually on July 1. It awarded alimony to Creditor in the amount of \$2,282.11 per month for a period of 5 years, 5 months, beginning with February 2006. As to child support, it ordered Debtor to pay arrearages in the amount of \$950.00 per month from August, 2005 through January, 2006. It further ordered he pay \$2,351.00 per month beginning on February 15, 2006, and continuing on the 15th day of each month “until the children have turned 18 years of age, or there shall be a modification of the child support calculation by order of this Court.”¹⁹ Finally, the Family Court awarded Creditor \$10,000.00 in attorneys’ fees, to be paid no later than December 31, 2006.

Debtor appealed to the Supreme Court. The Supreme Court affirmed all parts of the 1/30/06 Family Court Order but for the award of child support.²⁰ On remand, the Family Court reduced this child support obligation to \$2,308.00 per month.

Creditor did not comply with the Family Court orders regarding payments and various proceedings thereafter took place. A Family Court Commissioner entered the earlier discussed 9/14/06 Family Court Order wherein it found Debtor owed child support arrears/retroactive support in the amount of **\$14,679.52**, which was reduced to Judgment 1. Again, no interest was awarded.

Thereafter, Debtor sought a further reduction of his child support payments based upon his contention he could not work due to his own mental health issues. By order dated April 9, 2007, a Family Court Commissioner reduced his child support obligations to \$1,129.00 per

¹⁹1/30/06 Family Court Order (Plaintiff’s Exhibit #1) at 26-7.

²⁰ *Andrews v. Andrews*, No. 108, 2006, Holland, J. (Del. Dec. 5, 2006).

month beginning April 1, 2007.²¹

About this time, Debtor fled to Israel to avoid his court-ordered obligations.

Meanwhile, Creditor filed the aforementioned Petition for Rule to Show Cause (“RTSC”), Petition to Modify Custody and Visitation, and Request for Review of the Commissioner’s April 9, 2007, order reducing Debtor’s child support obligations. The Family Court addressed these requests in the previously-mentioned 8/13/07 Family Court Order.

The Family Court affirmed the Commissioner’s decision reducing Debtor’s child support obligations to \$1,129.00 per month.

As to the \$30,000.00 Creditor claimed was due in interim alimony from the August 2004, interim order, the Family Court ruled she was entitled to that entire \$30,000.00. The award of the entire \$30,000.00 may have been undeserved as the evidence shows some sums previously were to be credited towards that award.²² However, because Debtor fled to Israel during this time and did not file any objections to the 8/13/07 Family Court Order, he is bound, by his own failure to object, to the determination that the entire \$30,000.00 was owing as of August 13, 2007.

Consequently, I recommend the Court conclude Debtor cannot receive any credits for any payments made before August 13, 2007, towards the \$30,000.00 in interim alimony.

The Family Court found that because Debtor had fled from the United States and the

²¹8/13/07 Family Court Order (Plaintiff’s Exhibit #3) at 4.

²²In May, 2005, Family Court ordered that the proceeds of the sale of a vehicle for \$1,000.00 should be applied to the \$30,000.00 previously owed. 1/30/06 Family Court Order (Plaintiff’s Exhibit #1) at 4. The Family Court also ordered Debtor to apply monies from a tax refund to the \$30,000.00. According to the 1/30/06 Family Court Order, Debtor paid \$2,000.00. *Id.* at 5-6. A Final Report and Account from the Bankruptcy Court establishes that the Bankruptcy Court Trustee paid Creditor \$3,622.20 towards that \$30,000.00. Defendant’s Exhibit #6.

Court's remedies were limited, "the appropriate remedy at this juncture is to enter a monetary judgment in favor of Wife and grant Wife permission to enter the judgment into the records of the Superior Court so that she may pursue whatever enforcement procedures that are available to her."²³ As was explained above, the Family Court entered a judgment providing for Creditor to recover **\$78,921.09**, which reflects **interim alimony** in the amount of **\$30,000.00** which Debtor failed to pay pursuant to the August 2004 interim order; **\$34,152.41** in **permanent alimony**; a **\$4,768.68** payment on Creditor's **equitable share** of the marital estate; and **\$10,000.00** in **attorney's fees** owed to Creditor as of the date of the RTSC hearing. It also ordered Debtor to pay **post-judgment interest** at the legal rate commencing from May 16, 2007, plus **execution costs**. Finally, it ordered the judgment be entered with the Superior Court.

Creditor appealed the portion of the 8/13/07 Family Court Order reducing child support. The Supreme Court affirmed the Family Court's decision, ruling the child support reduction was appropriate.²⁴

Creditor then began her quest to collect the monies due her. Debtor actively sought to prevent the collection of those monies.

In **December, 2007**, Creditor received the proceeds from the sale of DTE Energy stock in the amount of **\$2,548.00**.²⁵

Creditor sought to execute on Judgment 2. Debtor enlisted the help of his mother Sally Eder ("Eder") and Anthony Morabito ("Morabito") to evade the executions. The full history of

²³8/13/07 Family Court Order at 8.

²⁴*Andrews v. Andrews*, 959 A.2d 27, 2008 WL 4349028 (Del. Sept. 24, 2008).

²⁵Defendant's Exhibit #9.

the executions and evasions thereof exists in the file for Judgment 2. After much effort, Creditor was able to obtain some proceeds from the sale of two of Debtor's vehicles. On March 18, 2008, a Toyota Avalon was sold for \$8,000.00.²⁶ However, Sheriff's fees and costs totaled \$584.45.²⁷ Creditor only netted \$7,415.55 on the sale of the Toyota Avalon. *Because Creditor is entitled, pursuant to the terms of the 8/13/07 Family Court Order, to recover execution costs, I recommend the Superior Court conclude **Judgment 2 is reduced by \$7,415.55 as of March 28, 2008.***²⁸ On October 23, 2008, a Chevrolet Suburban was sold for \$700.00.²⁹ However, Sheriff's costs were \$392.27 and because she is entitled, pursuant to the 8/13/07 Family Court Order, to execution costs, Creditor need only apply the net proceeds of \$307.73 towards the judgment owed. *Consequently, I recommend the Superior Court conclude that **Judgment 2, as of October 29, 2008, was reduced by \$307.73.***

Creditor was litigating her collection efforts on two fronts during this time. While she was attempting to retrieve the vehicles and personal property taken out of Debtor's home in the Superior Court, she had to pursue litigation in the Court of Chancery to stop the fraudulent transfer of assets. In August, 2007, Creditor filed suit in Chancery Court against Debtor, Eder, Morabito, and David August, D.O., Co., seeking remedies for the fraudulent transfer of various

²⁶Sheriff's Return filed on March 28, 2008.

²⁷*Id.*

²⁸This number differs from that which Creditor provided the Court. *See* Defendant's Exhibit #9. She gave Debtor credit for the full amount of the sale against the debt owed. The Sheriff's costs, however, are in the record of this case. Because the 8/13/07 Family Court Order allows for their recovery, the Court will reduce the principal amount of the debt owed only by the net amount Creditor recovered.

²⁹Sheriff's Return filed on October 29, 2008.

items of property. *August v. August, et al.*, Del. Ch., C.A. No. 3180-VCS (“Chancery Case”).

Various resolutions reached and several decisions entered in the Chancery Case are pertinent to the current matter. Consequently, I detail them below.

The claims against Morabito focused on the fraudulent transfer of personal property. Creditor ultimately settled with Morabito for \$4,000.00 and he was dismissed from the Chancery litigation. Debtor testified in the case at hand that he reimbursed Morabito for this \$4,000.00 payment. He argued he should receive credit for that payment against the monies he owes Creditor. *I recommend the Court conclude there is no legal basis for Debtor to receive credit for this reimbursement and that Debtor only is entitled to credit for monies he paid Creditor except in the limited situation discussed below where Eder paid Creditor.*

The Chancery Case claims against Debtor and Eder involved the real estate located at 55 Comanche Circle, Millsboro, Delaware (“Subject Property”). Debtor transferred title to the Subject Property to Eder. After the filing of the suit in Chancery, Eder quitclaimed all of her rights in the Subject Property to Debtor. However, that did not end the lawsuit.

The first pertinent decision in the Chancery Case was the March 10, 2008 Order of Default and Partial Judgment entered against Debtor and David August, D.O., Co.³⁰ That Order provided in pertinent part:

1. The defendants, David August and David August, D.O., Co., are adjudged to be in default in this action.
2. Plaintiff Jennifer August is entitled to recover from defendant David August in the amount of \$58,307.74 plus costs as well as pre-judgment and post-judgment interest at the legal rate. That amount is the court’s best estimate of the plaintiff’s damages on the record before it and was calculated by summing the two unpaid installments of the property division due July 1, 2006 and July 1, 2007 with the

³⁰Plaintiff’s Exhibit #10.

totals of the child support arrears and spousal support arrears contained in Exhibit 4 to the plaintiff's Motion for Entry of Default Judgment Against Defendants David August and David August D.O. Co. Pursuant to Rule 55(b). To the extent this figure departs from the current damages the plaintiff can establish against defendant David August, if at all, plaintiff may seek additional funds from the account to be established pursuant to Paragraph 6 of this Order in an appropriate court.

3. A lien in the amount provided in Paragraph 2 of this Order shall be placed on the property commonly known as 55 Comanche Circle, Millsboro, Delaware, 19966, ... (the "Subject Property") for the benefit of the plaintiff, and subject to a first mortgage held by Washington Mutual Bank. Such lien shall be recorded with the Sussex County Recorder of Deeds along with a copy of this order.

4. Consistent with defendant Eder's renunciation of the quitclaim deed and second mortgage from defendant David August to defendant Eder in the Subject Property, and as evidenced by her quitclaim deed dated October 12, 2007 conveying any and all rights in the Subject Property held by her to defendant David August, defendant David August has legal title to the Subject Property. Because of defendant David August's misconduct, his unsatisfied obligations to the plaintiff and others, and failure to appear, the plaintiff may, if she so chooses, exercise sole control over the sale, disposition, or other use of the Subject Property, subject, however, to the rights of Washington Mutual Bank. In particular, the plaintiff may exercise any rights of ownership over the Subject Property as are necessary for her, in accordance with Washington Mutual Bank, to sell or otherwise maximize the value of the property for their joint benefit and in accordance with this Order.

6. In recognition of the ongoing support and other obligations of the defendant David August, any proceeds of a sale or other disposition of the Subject Property exceeding both any proceeds owed to Washington Mutual Bank pursuant to its mortgage and the amount provided in Paragraph 2 shall be placed in trust by the plaintiff in an interest-bearing account pending a determination or determinations of the plaintiff's right to collect from the defendant David August. ***

To clarify, this order "effectively deem[ed] the transfer of the Property from him to Eder a fraudulent one" and allowed Creditor to exercise ownership rights over the Property in order to maximize her recovery.³¹

At a later point in the litigation, during a court proceeding, the following exchange

³¹*August v. August*, 2009 WL 458778, *2 (Del. Ch. Feb. 20, 2009). This decision is Plaintiff's Exhibit #8.

occurred:

MRS. AUGUST: ... There has been an assertion that [the judgment entered against David August in the Chancery case] is the only claim; that that trumps the recorded judgment of \$87,000 in Superior Court and that —

THE COURT: There has been a claim by who?

MRS. AUGUST: Mr. Sergovic. We are not sure if that is in addition to or instead of the previously-recorded Family Court judgments.

THE COURT: It's in addition to it. It doesn't extinguish it. The whole premise of the order is that the child support obligation is alive and well.³²

The second pertinent Chancery Court decision is the February 20, 2009 decision, hereinafter sometimes referred to as "Fraudulent Conveyance Decision". This decision contains the following findings and conclusions.

While he was in Israel, Debtor quitclaimed the Subject Property to Eder. Creditor filed a *lis pendens*. A contract for the sale of the Subject Property at the price of \$315,000.00 was entered. Had the sale been completed, net proceeds of around \$50,000.00 would have been realized after closing costs and satisfaction of the senior mortgage. The *lis pendens* blocked the sale.

The Court of Chancery notes the existence of the Family Court orders and judgments.³³ It references the procedural posture of the Chancery case. It explains that the default judgment was entered against Debtor in the Chancery case and thereby Debtor "lost standing to challenge the factual assertions of the complaint."³⁴ It recites the fact that Eder "conceded that the Quitclaim

³²Plaintiff's Exhibit #12.

³³*August v. August*, 2009 WL 458778 at *3.

³⁴*Id.* at *9.

Deed effected a fraudulent transfer, and has chosen not to defend its legitimacy.”³⁵ The Chancery Court explains that because, in May 2008, Creditor received an offer of \$250,000.00 to purchase the property, which was insufficient to pay off the mortgage, Creditor was unable to realize the money awarded her in the Default Judgment.³⁶

The Chancery Court considered, in its decision, the question of to what further equitable relief Creditor was entitled in light of the fact that Eder had returned the asset. As explained, “[t]he overarching goal in applying these remedies is to put a creditor in the position she would have been in had the fraudulent transfer not occurred.”³⁷ The remedy of restitution exists because “the mere acceptance of the asset by the recipient works a wrong on the third party creditor by preventing the creditor from reaching an asset she could have otherwise used to satisfy her debts.”³⁸ In examining the remedy available to Creditor, the Chancery Court stated as follows at

**13-14:

In this case, two purported transfers occurred: the Second Mortgage in April 2006 before David August’s flight; and the Quitclaim Deed in March 2007, after David August had become a fugitive. I focus my remedy here on restoring Jennifer August to the position she would have been in if the Quitclaim Deed and Second Mortgage had not impeded her attempt to extract value from the Property, a period that roughly began when David August fled and the Quitclaim Deed was executed. I choose that period because that is when Jennifer August first made an attempt to extract value from the Property. ***

If David August had not fraudulently transferred the Property, Jennifer August would have had access to the equity existing in the Property at the time of his

³⁵*Id.*

³⁶*Id.*

³⁷*Id.* at *10.

³⁸*Id.*

departure. For her to realize that equity, the Property would have had to have been sold. I therefore look to the purchase price that was offered on the Property in July 2007 as the most reliable evidence in the record of how much equity was in the Property. Eder ... entered a sales contract in July for \$315,000. ... a fair market price. The estimated seller's closing costs for this transaction were \$22,050. At the time, the payoff amount on the WaMu Mortgage was \$243,148.78. This left approximately \$49,800 in value that would have been available to Jennifer August had the transfer not occurred. I recognize, however, the fact that realizing that amount required an outlay of money. Eder paid \$8,850.67 in WaMu Mortgage and maintenance payments in order to keep the Property saleable until a purchaser could be found. As a result, Jennifer August is entitled to recover \$40,950 from Eder under the equitable principles outlined in the UFTA and our common law. FN 83 [All other footnotes and citations omitted.]

FN83. In keeping with the requirement that a creditor cannot recover more from a transferee than the amount a creditor is owed, I note that this amount is considerably less than the \$58,307.74 that this court already determined Jennifer August was owed in the Default Judgment, not to mention all of the unpaid child and spousal support and interest that has accrued since then.

The Court's conclusion was as follows:

For the foregoing reasons, I award Jennifer August a judgment against Sally Eder in the amount of: 1) \$40,950 in principal amount; 2) \$8,430.58 in pre-judgment interest, composed of simple interest at the legal rate of 11.25% fixed as of March 23, 2007; and 3) post-judgment simple interest at the legal rate accruing from the date of this judgment until the date of the satisfaction of this judgment. Costs are also awarded to plaintiff Jennifer August. The outstanding liens Jennifer August holds on David August's property shall be reduced to the extent this judgment is satisfied. To the extent that Eder proves to this court by way of separate complaint that David August has satisfied all of his outstanding obligations to Jennifer August and her children, plus full payment of interest, she may seek to be relieved of the burden of the judgment in this case.³⁹

On April 9, 2009, Eder paid Creditor the monies due and owing. She paid \$49,645.63, representing \$40,950.00 in principal and \$8,695.63 in pre-judgment interest; \$2,805.80 for costs to Chancery Court; \$11.78 for post-judgment interest; \$13.44 regarding additional post-judgment

³⁹*Id.* at *17.

interest.⁴⁰

The Chancery Court issued a letter dated April 21, 2009, stating the following:

This letter is to inform all of the parties in the above-captioned matter that the claims brought by plaintiff Jennifer August against each of the defendants have been resolved in full and that this civil action is now closed.

As agreed in the joint letter of Jennifer August and defendant Sally Eder dated April 17, 2009, the judgment the court issued against Eder on February 20, 2009 has been satisfied, and all issues between Jennifer August and Eder are closed.

All claims between Jennifer August and defendant Anthony Morabito were dismissed with prejudice by this court on December 8, 2008, in accordance with a settlement agreement that Jennifer August and Morabito entered into on November 20, 2008

Finally, the claims brought by Jennifer August against David August and David August, D.O., Co. were resolved by this court's order of default and partial judgment entered on March 20, 2008.

As a result of these dispositions, there are no outstanding issues between the parties to this action at this time, and the matter is hereby closed.

IT IS SO ORDERED.⁴¹

In September, 2008, Debtor filed a motion for relief from judgment with Family Court.

The Court dismissed this motion and noted that the Chancery Court's decision was not germane to the issue pending before it.⁴²

The parties returned to Family Court in November 2009 to address various issues concerning child, spousal, and medical arrears.⁴³ As a part of these proceedings, Debtor argued payments Eder made to Creditor should be attributed to Debtor's debt. The Family Court Commissioner concluded in her November 6, 2009 Decision at pages 1-2:

⁴⁰Defendant's Exhibit #4.

⁴¹Defendant's Exhibit #3.

⁴²Plaintiff's Exhibit #14 at 4-5.

⁴³Plaintiff's Exhibit #5.

Unfortunately, from the evidence at the hearing that is the subject matter of this decision, it is not possible to know what the default judgment in Chancery Court covered, and to what extent, if any, the judgment against Dr. August's mother incorporated any spousal support showing on the DCSE account statement. The Family Court judgment was clearly for unpaid alimony, and it is presumed herein that spousal support, which predates the filing of the divorce, was not part of the figure awarded. Ms. August testified that she has provided Dr. August with an accounting; it would be beneficial to him to review that accounting and do his math. There is insufficient evidence in this case to overturn the DCSE account statement.⁴⁴

The Court then modified the previous Family Court orders to provide, that effective August 17, 2009, Debtor must pay \$2,946.00 to child support; \$523.00 to arrears/retroactive support; \$100.00 to medical support; and \$2,282.11 to spousal support, for a total monthly payment of \$5,851.11

On **February 17, 2010**, shares of David August were transferred to Jennifer August but there is no information on their value or how they might affect the balance owed.

On **January 10, 2011**, Debtor was ordered to pay an additional \$200.00 to medical support, making his total medical support payment \$300.00 and increasing his total monthly payment to \$6,051.11.⁴⁵ Payments to the medical support category are irrelevant to the Superior Court judgments.

During the hearing in this Court on October 17, 2011, Karen Smalls, Senior Fiscal Administrative Officer of DCSE's Accounting Unit, testified regarding payments Debtor has made towards the child support, spousal support and medical support orders. She employed the

⁴⁴The Commissioner did not have the information in front of her which this Court has. This Court, employing the evidence and the law discussed below, is able to determine how to apply the monies Eder paid Creditor towards the Family Court debt.

⁴⁵Plaintiff's Exhibit #6.

account statement on the matter which was introduced as Defendant's Exhibit #1. Her testimony and this account statement provided information necessary to resolve the question of what is owed on the pending judgments.

The account statement only shows monies paid to child support, spousal support, medical support, retroactive child support and retroactive spousal support. It does not reflect payments made towards the **\$4,768.68** debt representing Creditor's **equitable share** of the marital estate; the **\$10,000.00** debt in **attorney's fees**; nor the **\$30,000.00** debt for **interim alimony**. Family Court has not been, and will not be, keeping an account of the debts in those categories.

The account statement shows all payments made as of September 20, 2011. Debtor produced evidence that the Family Court wage attachment transferred monies from his October, 2011 paycheck to Family Court.⁴⁶ However, the application of that payment to his Family Court obligations is not in the record. Thus, all my calculations end as of September 20, 2011.

The account statement shows that as of February 1, 2007, the child support arrears were caught up and Debtor had paid the \$14,679.52 which Judgment 1 secured. *Thus, I recommend the Superior Court order Creditor to mark Judgment 1 satisfied.*

I now turn to a consideration of what might be owed on Judgment 2.

The single most important question in this case is whether Debtor may receive credit for the monies Eder paid Creditor as a result of the Chancery Case. Creditor maintains that the phrase "outstanding liens" which the Chancery Court ordered to be reduced to the extent the judgment was satisfied encompasses only the default judgment "lien" against Debtor filed with the Recorder of Deeds.

⁴⁶Defendant's Exhibit #2.

The Chancery Court explained the nature of Creditor's action and the remedy awarded her in the Fraudulent Conveyance Decision.⁴⁷ The relief awarded put Creditor in the position she would have been had the fraudulent transfer not occurred. The Chancellor⁴⁸ awarded Creditor the amount of money she would have received had she been able to sell the Subject Property without Debtor and Eder's interference. That is \$40,950.00 in net proceeds plus interest. Put another way, had Creditor been able to sell the Subject Property without Debtor and Eder's interference, Creditor would have had to have credited those monies to Debtor's debt to Family Court and also would have had to reduce Judgment 2 by that amount. Creditor could not have pocketed the \$40,950.00 and thereafter maintained that Debtor still owed her the full amount on Judgment 2.

Nothing in any of Chancellor Strine's decisions or oral statements support Creditor's position. He clarifies that she is not entitled to anything more than what she is owed. He views the debt in Family Court as what Creditor is owed. It is clear that he hoped Debtor would assume his responsibilities and not allow his mother to pay his debts.⁴⁹ That fact shows the Chancellor did not consider the award to be duplicative and in the nature of a windfall but instead, he considered it to be a payment on the Family Court debt owed. Finally, the Chancellor's decision specifically directs that the judgment liens Creditor holds be reduced by the amount Eder paid Creditor.

⁴⁷*August v. August*, 2009 WL 458778 at **10, 13.

⁴⁸He was a Vice Chancellor at the time he issued the decision; he now is Chancellor of Chancery Court.

⁴⁹This conclusion is based upon the following statement: "To the extent that Eder proves to this court by way of separate complaint that David August has satisfied all of his outstanding obligations to Jennifer August and her children, plus full payment of interest, she may seek to be relieved of the burden of the judgment in this case." *August v. August*, 2009 WL 458778 at *17.

No legal reason exists not to apply the \$40,950.00 plus interest towards the underlying Family Court debt and consequently, to reduce the judgment lien in Superior Court by that amount. As explained below, I conclude that an appropriate application of the Chancery Court payments towards the Family Court account can be made. Should this Court not give Debtor the credit due, it would thereby grant Creditor a windfall to which she is not entitled. Again, the Chancery Court remedy put her in the position in which she otherwise would have been but for Debtor and Eder's interference. *Thus, I recommend the Court credit Debtor's account with the \$40,950.00 in principal and the \$8,720.85 in interest which Eder paid and reduce Judgment 2 by that amount.*

The next question is how to apply those payments when the parties have not made an application thereof. The law provides, that generally, payments are applied to interest first and then to principal.⁵⁰ However, the law also is that the Court should apply the payments in such a manner as will best protects the rights of the parties and is most just in light of the circumstances.⁵¹ To accomplish this goal, I take the following steps.

1) I duplicate the Family Court's actions and apply payments from wage attachments to reduce the principal debt owed on the spousal support category of Judgment 2.⁵²

2) I apply payments from all other sources (sales of vehicles and stocks, payment from

⁵⁰*Nelson v. Kamara*, 2009 WL 1964788 (Del. Super. June 30, 2009), *app. dismissed*, 981 A.2d 1172, 2009 WL 3083212 (Del. Supr. Sept. 25, 2009); *Estate of Carpenter v. Dinneen*, C.A. No. 1804-VCP, Parsons, V.C. (March 26, 2008) at 67 n. 239; 70 C.J.S. *Payment* § 60 (2007).

⁵¹*Estate of Carpenter v. Dinneen*, *supra*; 70 C.J.S. *Payment* § 60 (2007).

⁵²To do otherwise would create an accounting nightmare between this Court and Family Court.

Eder) to the interest owed first and then to the principal due.

3) I will not apply the non-interest, non-wage payments to the category of spousal support. Instead, I apply those payments to the categories of Judgment 2 representing the awards for interim support, equitable share of the marital estate, and attorney's fees.

If I did not apply the payments in this manner, then Creditor would have more difficulty collecting the monies owed. If I applied all payments to the spousal support category first, then the monies owed in the other categories would remain outstanding. The Family Court will not collect monies owed in those other categories. Creditor's remedies then would be limited to collecting the monies owed by attempting executions on Judgment 2, a process which has not been particularly productive. Family Court's collection of the spousal arrears has proven more fruitful than Creditor's attempts to levy upon Debtor's property. Justice is better served by applying payments as explained above.⁵³

In order to determine what is owed, I set forth below my calculations based upon the evidence presented and by employing the law regarding the application of the payments.

⁵³Of course, if Debtor would fulfill his legal obligations and pay Creditor the long past-due debt, then determining the most productive way for Creditor to collect this debt would be unnecessary.

<u>PRIN.BAL.</u> ⁵⁴	<u>TIME PERIOD</u>	<u>INT. ACCR.</u> ⁵⁵	<u>INT. BAL.</u> ⁵⁶	<u>DATE/AMT PAID</u>	<u>INT.BAL.</u> ⁵⁷
\$78,921.09	5/16/07-12/31/07	\$5,546.61	\$5,546.61	12/31/07 \$2,548.00 ⁵⁸	\$2,998.61
\$78,921.09	1/1/08-3/28/08	\$2,138.40	\$5,137.01	3/28/08 \$7,415.55 ⁵⁹	0
\$76,642.55	3/29/08-10/29/08	\$5,032.30	\$5,032.30	10/29/08 \$307.73 ⁶⁰	\$4,724.57
\$76,642.55	10/30/08-1/23/09	\$1,958.80	\$6,683.37	1/23/09 \$9,942.37 ⁶¹	\$6,683.37
\$66,700.18	1/24/09-4/9/09	\$1,519.96	\$8,203.33	4/9/09 \$49,670.85 ⁶²	0
\$25,332.66	4/10/09-4/27/09	\$132.60	\$132.60	4/27/09 \$53.19 ⁶³	\$132.60
\$25,279.47	4/28/09-5/21/09	\$186.72	\$319.32	5/21/09 \$53.19	\$319.32

⁵⁴Principal Balance after making appropriate deductions or additions

⁵⁵Interest Accrued during specified time period

⁵⁶Interest Balance, which includes outstanding interest balance and the “Interest Accrued” balance

⁵⁷Interest Balance after deducting payment made, if such a deduction is applicable

⁵⁸Sale of DTE Energy Stock. The exact date of this transfer was not provided so the Court applies the end of the month as the effective date.

⁵⁹Sale of the Avalon.

⁶⁰Sale of Suburban

⁶¹Wages

⁶²Payment of principal and interest from Eder.

⁶³All the subsequent payments were from wage attachments and consequently, will be applied to the principal only.

\$25,226.28	5/22/09-6/18/09	\$209.79	\$529.11	6/18/09	\$53.19	\$529.11
\$25,173.09	6/19/09-6/30/09	\$85.25	\$614.36	6/30/09	\$1,732.15	\$614.36
\$23,440.94	7/1/09-7/29/09	\$201.88	\$816.24	7/29/09	\$53.19	\$816.24
\$23,387.75	7/30/09-8/27/09	\$201.60	\$1,017.84	8/27/09	\$53.19	\$1,017.84
\$23,334.56	8/28/09-9/24/09	\$186.68	\$1,204.52	9/24/09	\$53.19	\$1,204.52
\$23,281.37	9/25/09-10/21/09	\$186.42	\$1,390.94	10/21/09	\$53.19	\$1,390.94
\$23,228.18	10/22/09-12/29/10	\$3,092.22	\$4,486.16	12/29/10	\$1,766.89	\$4,486.16
\$22,461.29	12/30/10-6/15/11	\$1,191.85	\$5,678.01	6/15/11	\$2,282.11	\$5,678.01
\$20,179.18	6/16/11-7/26/11	\$248.40	\$5,926.41	7/26/11	\$2,282.11	\$5,926.41
\$17,897.07	7/27/11-8/23/11	\$148.77	\$6,075.18	8/23/11	\$2,282.11	\$6,075.18
\$15,614.96	8/24/11-9/20/11	\$129.87	\$6,205.05	9/20/11	\$2,310.74	\$6,205.05
\$13,304.22						

*I recommend that the Court employ the calculations set forth above and conclude the following. As of September 20, 2011, Debtor owed Creditor, on Judgment 2, **\$13,304.22 in principal** and **\$6,205.05 in interest**. Of the \$13,304.22 due on the principal as of September 20,*

2011, **\$11,181.60 consists of spousal support**,⁶⁴ which the Family Court will continue collecting with the wage attachment.⁶⁵ That means that the portions of the monies owed which the Family Court will not collect are \$2,122.62 in principal and the interest owed, which was \$6,205.05 as of September 20, 2011.⁶⁶

To the extent the wage attachment in Family Court provides Creditor with monies towards the spousal support, then Creditor must give Debtor credit for those sums. Now that all of the issues have been resolved and the parties have been instructed as to the correct application of the monies paid, the parties are capable of maintaining a current accounting.

Debtor will have to pay all outstanding interest due and the \$2,122.62 in principal owed on categories other than spousal support directly to Creditor because Family Court will not be collecting those sums in any manner.

Once Debtor has paid all that is owed towards the monies secured by Judgment 2, then Creditor must mark Judgment 2 satisfied. However, until Debtor pays the monies owed in full, Creditor can execute on Judgment 2. Thus, the motion to stay should be denied because it is clear Debtor owes Creditor monies secured by the lien of Judgment 2.

Creditor asked that the Court grant some forms of relief which are not available in this

⁶⁴Total owed on Judgment 2 towards spousal support: **\$34,152.41**
Total paid towards spousal support: **\$22,970.81**
Balance due on Judgment 2 towards spousal support: **\$11,181.60**

⁶⁵To clarify, these calculations and credits do not reduce the outstanding spousal support arrears balance owed in Family Court as of September 20, 2011, which was \$42,986.06. Put another way, of that \$42,986.06 balance, \$11,181.60 is attributable to the moneys which Judgment 2 secures.

⁶⁶Of course, interest will continue to accrue until all monies due are paid.

matter. Creditor only is entitled to execute on this judgment as set forth in the laws of the State of Delaware. This is not an equitable proceeding. The remedies, while limited, are clear. *Thus, I recommend the Court conclude Creditor's remedies are limited to executing on the judgment lien and no other remedies are available to her in this matter.*

CONCLUSION

I recommend this **16th DAY OF NOVEMBER, 2011**, that the Superior Court:

- 1) Adopt the findings of fact set forth above; and
- 2) Reach the recommended conclusions of law contained in the body of this decision.

COMMISSIONER

cc: Prothonotary's Office
Jennifer August
David August